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No. 08-1269

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**In The
Supreme Court of the United States**

STATE OF LOUISIANA,

Petitioner,

v.

APRIL NICOLE ARMSTARD,

Respondent.

**On Petition For A Writ Of Certiorari
To The Louisiana Supreme Court**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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ARGUMENT

ABSENCE OF JURISDICTION IN THIS COURT

The Constitution vests the judicial power of the federal government in this Court and in such inferior courts as the Congress may from time to time establish. Art. III, § 1, U.S. Const. "The judicial power shall extend to all cases, in law and equity, arising under th[e] Constitution, the laws of the United States, and Treaties made, or which shall be made, under their (the Constitution and federal laws') authority. . . ." Art. III, § 2, cl. 1, U.S. Const. "The appellate jurisdiction of this Court extends only to cases defined by Congress, and it can be exercised only in the manner prescribed, even though a wider jurisdiction might be permitted by the Constitution. Thus, a jurisdictional statute, such as 28 U.S.C. § 1257, is to be strictly construed." See 2 Fed. Proc., L.Ed. § 3:16, collecting authorities.

A party seeking review in this Court must raise a federal question in the state court, and cannot rely on the fact that someone else has raised it there. *Sully v. American Nat. Bank*, 178 U.S. 289, 20 S.Ct. 935, 44 L.Ed. 1072 (1900). Moreover, one cannot invoke the appellate jurisdiction of this Court to vindicate a right of a third party. *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

The Question Presented for Review does not raise an issue of the State's constitutional rights. Rather, it vicariously asserts the alleged rights of the newborn child under the Fourteenth Amendment, in

contravention of the self-imposed limits of this Court's jurisdiction against invoking it to vindicate a right of a third party. *Hanson v. Denckla, supra*.

The alleged federal question presented for review by this Court was never raised by the State in the State Courts, contrary to the requirements of *Sully v. American Nat. Bank, supra*, and its progeny. As shown by the opinion below, respondent argued in the Court below that "the trial court erred in denying her motion to quash on equal protection grounds: the charge discriminates against her on grounds of her status as a drug user who gave live birth." *State v. Armstard*, 991 So.2d 116, at 119, 43,333 (La. App. 2d Cir. 8/13/08). Significantly, nothing more was said about that issue. Instead, the Court of Appeal decided this case upon the adequate, independent state-law ground of the interpretation of La.R.S. 14:93 that the Legislature did not intend by that statute to make prenatal drug use which momentarily entered the newborn's blood stream through the umbilical cord, during the fleeting moment between extrication of the baby from the birth canal until the umbilical cord was clamped, a punishable offense under § 93. 991 So.2d at 124. The Court below observed that

the Legislature considered but failed to act on two proposed bills to amend La.R.S. 14:93 that would have criminalized the "intentional or criminally negligent prenatal exposure of an unborn child to a controlled dangerous substance" that results in symptoms or harmful effects or the presence of the

substance in the newborn. See HB 1205, 1210, 2008 Reg. Sess. This fortifies our conclusion that the defendant's conduct does not constitute cruelty to a juvenile under existing law.

Id., at 124 n. 5.

The dissenting opinion states that the Majority "[f]ocus[ed] on an equal protection argument" in stating that "this prosecution would criminalize the act of giving birth." That was a mischaracterization of the basis for the Majority opinion of the Court below. The Majority opinion is based solely and simply upon the canons of statutory construction and ignored the respondent's request to decide the case on equal protection grounds. The State may not adopt that erroneous mischaracterization of the Majority's *ratio decidendi*, but changed the alleged victim of that discrimination from the mother to the newborn, and presented in good faith to this Honorable Court that the opinion below was based on equal protection grounds, when it was not. It is significant to note that the State has not specified "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised" by it, as required by Supreme Court Rule 14(1)(G)(I), OR "THE WAY IN WHICH THEY WERE PASSED ON BY THOSE COURTS." *Ibid.* The obvious reason for that omission is that the issue raised by the State's petition refers to deprivation of a newborn child's constitutional rights; whereas, the only equal protection issue raised in any Louisiana Court in this case related to the

mother's right not to be discriminated against as a pregnant drug user solely because her child did not die *in utero*. The issue presented in the State's petition is not properly before this Honorable Court, and on that basis alone, this Honorable Court should deny petitioner's application for a writ of certiorari.

The State well understands that if certiorari is granted in this matter Louisiana and the other forty-nine states can immediately flood the federal system with every prosecution which the State bungles, on the basis of some civil right granted by the U.S. Constitution to the victim, who did not get his just desserts, in seeing the accused successfully tried and sentenced. The number of purely state criminal matters which would be thrust upon this Court, at least in terms of a petition for certiorari, is prodigious.



ABSENCE OF ERROR BELOW

The Second Circuit Court of Appeals for the State of Louisiana lucidly disposed of the State's appeal, but respondent would nevertheless urge this Honorable Court's attention to the case of *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 cited for the proposition that the constitutional requirement of *definiteness* is violated by a statute which fails to give fair notice that the conduct is forbidden by the statute, i.e., that no man should be held criminally responsible for conduct which he cannot reasonably understand to be proscribed. U.S.C.A. Constitution XIV.

The Court below stated (991 So.2d at 122):

Our review of Louisiana jurisprudence involving the charge of cruelty to a juvenile has revealed no cases where the mistreatment or neglect was based on an *involuntary* act such as the pumping of blood through the umbilical cord during the birthing process after having earlier ingested drugs or alcohol. On the contrary, all of the Louisiana cases of which we are aware involve some kind of overt act or omission that was intentional or criminally negligent. For example . . .

And the Court below proceeds to prove its point through applicable examples of prior cruelty to juvenile prosecutions. The Court then explored the element of criminal intent incorporated within § 93. La.R.S. 14:8 defines criminal conduct in Louisiana as follows:

Criminal conduct consists of:

- (1) An act or failure to act that produces criminal consequences, and which is combined with criminal intent or
- (2) A mere act or failure to act that produces criminal consequences, where there is no requirement of criminal intent; or
- (3) Criminal negligence that produces criminal consequences.

In view of the Court's deep research into Louisiana law under La.R.S. 14:93 and its recognition that a

voluntary act must exist in order to make anything a crime in this State, which the circulation of the mother's blood into the fetus or newborn immediately after delivery before the umbilical cord is clamped is not, it would change the established law of this State to hold, as the State contends, that La.R.S. 14:93 applies to the involuntary act of pumping the mother's blood into the fetus and, momentarily after birth, into the newborn when he is first recognized under Louisiana law to be a "child" to whom Article 93 applies. While the State Courts have exclusive right to interpret the laws made by its legislature, and this Court's power does not extend to reinterpreting the State law but only to determining whether the State law violates federal constitutional or statutory law or administrative regulations, which are the Supreme Law of the Land, it is not appropriate for this Honorable Court to step into the State Courts' shoes and re-interpret Article 93 in a way that would conceivably make it applicable to respondent's alleged conduct. If this Court were to do that, it would be ignoring its own precedent in *Bouie v. City of Columbia*, *supra*, in which this Court held (378 U.S. at 353-354, 84 S.Ct. at 2702-03):

An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. VI, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes

such action," or "that aggravates a crime or makes it greater than it was, when committed." *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. * * * The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," * * *, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. * * *

If this Honorable Court were to do what the State asks, it would not only improperly invade the province of State courts to interpret State laws, but to make such an interpretation and then retroactively apply it to this case would be barred by the Due Process Clause of the Fifth Amendment, just as much as it would be barred by the Fourteenth Amendment Due Process Clause if the State Supreme Court were to change the interpretation of a criminal law and retroactively apply the new interpretation to bring the respondent's conduct within the scope of the prohibitions of the criminal law. The rationale of *Bouie* applies just as much to the decisions of this

Honorable Court as it does to the decisions of inferior courts.

CONCLUSION

For the foregoing reasons, this Honorable Court should follow its precedents self-imposing limits upon its jurisdiction to those cases in which the petitioner has fully presented the federal or constitutional question to the State courts, and its precedents denying discretionary review of State cases when their decisions are predicated upon an adequate, independent state-law ground. This Court should not violate its own precedent in *Bouie v. City of Columbia*, *supra*, by proposing modifications of La.R.S. 14:93 that would authorize respondent's prosecution when the Louisiana law, as it existed at the time of the alleged offense, did not include cases such as this one. That would violate the Due Process Clause of the Fifth Amendment to the United States Constitution to the same extent that it violates the constitutional prohibition against *ex post facto* application of judicial decisions by State courts under the Due Process Clause of the Fourteenth Amendment, as held in *Bouie*, for a State Court to do so.

This Honorable Court should not open the door to the States to vicariously assert the constitutional rights of victims of crime as grounds for this Court to assert federal jurisdiction over an otherwise purely local case. As a case which does not present an

adequately-raised federal statutory or constitutional question in the State courts, or one which vicariously urges jurisdiction over the alleged violation of the rights of third-party victims in criminal cases, is not within the scope of this Court's jurisdiction, under the self-imposed jurisdictional limitations referenced in the above counter-statement to the State's Statement of this Court's Jurisdiction, is a frivolous case in which to invoke this Honorable Court's discretionary jurisdiction under 28 U.S.C. § 1257, this Honorable Court should impose sanctions upon the petitioner, the State of Louisiana, and require it to reimburse the reasonable attorney's fees expended by the respondent in order to prepare and present this Response in Opposition to Petition for Writ of Certiorari. This Honorable Court should reject the State's petition for a writ of certiorari by denying same.

Respectfully submitted,

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